79-1872

Supreme Court, U. S.
FILED
MAY 27 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

CHARLES WILLIAM HOOD ..... PETITIONER

VS.

UNITED STATES OF AMERICA ..... RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DAN JACK COMBS
COMBS AND LESTER, P.S.C.
207 Caroline Avenue
P. O. Drawer 551

Counsel for Petitioner

PRINT MASTER, INC., 839 LANE ALLEN RD., LEXINGTON, KY. 40504, PH. (606) 277-5134

INDEX

Page

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED FOR REVIEW 2

STATUTES INVOLVED 2-5

STATEMENT 2-5

REASONS FOR GRANTING THE WRIT 7-14

I. **THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THEY COULD FIND THIS PETITIONER GUILTY AS AN AIDER AND ABETTOR WHERE THERE WAS NO EVIDENCE THAT THIS PETITIONER KNEW OR INTENDED THAT THE VICTIMS WOULD BE TRANSPORTED IN INTERSTATE COMMERCE, AND WHERE THE GOVERNMENT'S CASE FAILED TO ESTABLISH THAT ANY VICTIMS WERE TRANSPORTED IN INTERSTATE COMMERCE.** 7-9

II. **WHETHER THIS PETITIONER IS ENTITLED TO A DECLARATION OF MISTRIAL WHERE COUNSEL FOR A CO-DEFENDANT CAUSED A WITNESS TO COMMENT UPON THIS PETITIONER'S FAILURE TO TESTIFY.** 9-12

III. **WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN EXCLUDING PRIOR INCONSISTENT STATEMENT OF ADVERSE WITNESS BY REFUSING TO PERMIT THIS PETITIONER'S TRIAL COUNSEL**

INDEX (Continued)

Page

FROM QUESTIONING ANOTHER WITNESS. 12-14

CONCLUSION 14

APPENDIX A 1a-3a

Opinion of the United States Court of Appeals 1a-3a

LIST OF AUTHORITIES CITED

CASES: Page

Anderson v. *Nelson*,
390 U.S. 523, 524 (1967) 11

Chapman v. *California*,
386 U.S. 18 (1967) 10, 11

Fontaine v. *California*,
390 U.S. 593, 596 (1967) 11

Giles v. *Maryland*,
386 U.S. 66, 74 (1966) 14

Matthew v. *United States*,
D.C. Cir. 449 F. 2d 985 (1971) 9

Meeks v. *Havener*,
545 F. 2d 9 (1976) 10

Nye and Nisson v. *United States*,
336 U.S. 613, 619 8

Ohio v. *Kentucky*,
_____ L. Ed. 2d _____ (1980) 7

U. S. v. *Barrett*,
539 F. 2d 244, 245 (1976) 13

U. S. v. *Earl*,
6th Cir., 529 F. 2d 1145 (1976) 10

U. S. v. *Kilpatrick*,
6th Cir., 477 F. 2d 357 (1973) 10

OTHERS:

18 USC 1201 . . . . . 2, 3, 8

18 USC 2 . . . . . 2, 4

Federal Rules of Evidence 613(b) 12, 13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. _____

CHARLES WILLIAM HOOD ..... PETITIONER

VS.

UNITED STATES OF AMERICA ..... RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Charles William Hood, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on April 25, 1980.

OPINION BELOW

The Opinion of the Court of Appeals below (Appendix A) is unreported. The Opinion of the District Court below is unreported.

JURISDICTION

The judgment of the Court below, Appendix A, was entered on the 25th day of April, 1980. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Trial Court erred in instructing the jury that they could find this defendant guilty as an aider and abettor where there was no evidence that this defendant knew or intended that the victims would be transported in interstate commerce, and where the government's case failed to establish that any victims were transported in interstate commerce.

II. Whether this petitioner is entitled to a declaration of mistrial where counsel for a co-defendant caused a witness to comment upon this petitioner's failure to testify.

III. Whether the Trial Court committed prejudicial error in excluding prior inconsistent statement of adverse witness by refusing to permit this petitioner's trial counsel from questioning another witness.

STATUTES INVOLVED

The statutes under which petitioner was prosecuted, though nothing turns on their terms, was 18 USC §1201 and 18 USC 2, which provide as follows:

"§ 1201. Kidnaping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

(1) the person is willfully transported in interstate or foreign commerce;

(2) Any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101(36) of the Federal Vaiation Act of 1958, as amended (49 U.S.C. 1301(36)); or

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116 (b) of this title,

shall be punished by imprisonment for any term of years or for life.

(b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.

(c) If two or more persons conspire to violate this section and one or more of such persons do

any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

(d) Whoever attempts to violate subsection (a)(4) shall be punished by imprisonment for not more than twenty years.

(e) If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places wi' hin the provisions of section 5 and 7 of this title and section 101 (38) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301 (38)).

(f) In the course of enforcement of subsection (a)(4) and any other sections prohibiting a conspiracy or attempt to violate subsection (a)(4), the Attorney General may request assistance from any Federal, State or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding."

"§ 2. Principals

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

STATEMENT OF THE CASE

The facts necessary to place in their settings the questions now raised can be briefly stated:

This petitioner, along with four co-defendants, was indicted on a one-count charge of kidnaping in the Eastern District of Kentucky. The defendants were tried jointly before a jury and a guilty verdict was returned against this petitioner and one other co-defendant. A hung jury resulted against the remaining co-defendants and charges were later dismissed upon the motion of respondent. Judgment was entered against this petitioner in the District Court and this petitioner, along with the co-defendant also convicted appealed to the United States Court of Appeals for the Sixth Circuit. Their convictions were affirmed on April 25, 1980. (Appendix A). This petition ensues.

During July of 1979, the Oil Chemical and Atomic Workers Union, of which this petitioner is a member, was on strike against the Semet Solvay Division of Allied Chemical Corporation seeking a labor contract. This plant is located in Ashland, Kentucky, being on the southern side of course of the Ohio River.

This petitioner along with the co-defendant convicted, were assigned to and operating on the Ohio River at Ashland, Kentucky the union boat being used for picketing purposes. At the same time as the occurrence of any kidnapping occurred, the three co-defendants who were not convicted also launched a boat on the Ohio River. No evidence was offered that the boats were the river by mutual intent. The evidence indicates that two men, after both were brought to shore, approached two Pinkerton guards on the Kentucky side of the Ohio River. One of the guards testified that this petitioner fired a shot striking him in the face and with the help of the other individual forced the two guards down the hillside and into the boat. This testimony was earlier repudiated by the statement of the guard to an officer of the Ashland Police Force describing the physical characteristics of one of the co-defendants who was not convicted; however, this testimony was excluded by the Trial Court.

The evidence and record is void as to any facts indicating this petitioner transported either victim across the state line between Kentucky and Ohio and likewise void as to any facts demonstrating a common purpose, mutual intent or even knowledge on behalf of this petitioner that the victims would be transported to the state of Ohio. It is uncontroverted that the victims were released in the water near the Ohio shore, although the exact location of the boundary line or the

low water mark of 1792 was not established. *Ohio* v. *Kentucky,* _____ L. Ed. 2d _____ (1980).

During the trial, the President of the Local Union testified and in an unresponsive answer to a question propounded by a co-defendant's counsel, stated that this petitioner had told him that this petitioner did not want to take the stand in the case. A motion for mistrial was made and overruled.

REASON FOR GRANTING THE WRIT

The United States Sixth Circuit Court of Appeals has decided a federal question in conflict with the decision of another Court of Appeals on the same matter and has further decided a federal question in conflict with applicable decisions of this Court.

I. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THEY COULD FIND THIS PETITIONER GUILTY AS AN AIDER AND ABETTOR WHERE THERE WAS NO EVIDENCE THAT THIS PETITIONER KNEW OR INTENDED THAT THE VICTIMS WOULD BE TRANSPORTED IN INTERSTATE COMMERCE, AND WHERE THE GOVERNMENT'S CASE FAILED TO ESTABLISH THAT ANY VICTIMS WERE TRANSPORTED IN INTERSTATE COMMERCE.

The Government's position, both in trial and on appeal, has been an inference of this petitioner's intent. Contrary to the evidence, the government has maintained that all the defendants entered into a joint decision to transport the victims to the state of Ohio. There is simply no evidence to support this position.

If the jury had believed this theory, would not all the other defendants have been convicted? We feel it important to stress that this issue does not rest on the commission of any acts of this petitioner within the jurisdictional limits of the Commonwealth of Kentucky, or any evidence indicating such activity.

This Court has long since recognized the basic elements of aiding and abetting. In *Nye and Nissen* v. *United States,* 336 U.S. 613, 619 this Court held:

> "In order to aid and abet another to commit a crime it is necessary that the defendant 'in some sort associate himself with the venture, and that he participate in it as in something that he wishes to bring about, that he seeks by his action to make it succeed.' " Citing L. Hand, J., in *U.S.* v. *Peoni,* 100 F. 2d 41, 402.

The government did not offer any evidence as to this petitioner's intent or actions concerning or seeking the furtherance of any activity that would constitute a violation of 18 USC 1201. In its opinion, the Court of Appeals held:

> "That the evidence justifies the instruction either on the theory that defendants helped to cause the others to take the guards to Ohio, or on the theory that the interstate transportation was a reasonably forseeable consequence of taking the guards on to the river." (Appendix, p. 2a).

In reaching this conclusion the Court of Appeals cited *Matthews* v. *United States*, D.C. Circuit, 449 F. 2d 985 (1971). Petitioner now submits that the Court of Appeals has misconstrued the holding in *Matthews*, or has ruled conversely to that holding. There must be evidence attributing to a defendant a knowing transportation in interstate commerce of a victim, not the mere possibility that such transportation would ensue. *Matthews*, supra, p. 989. The case at bar is strikingly in point. It is uncontroverted that all defendants were on the river on the night in question, but there is no evidence that this petitioner participated in, or knew, or even wished, that any victims would be transported across any state line into Ohio or elsewhere. Mere presence on the river is insufficient to support this conviction.

II. WHETHER THIS PETITIONER IS ENTITLED TO A DECLARATION OF MISTRIAL WHERE COUNSEL FOR A CO-DEFENDANT CAUSED A WITNESS TO COMMENT UPON THIS PETITIONER'S FAILURE TO TESTIFY.

After a weekend's recess, counsel for a co-defendant initiated his case in chief by calling the local union president as a witness. In an answer, which was unresponsive to the question asked, the witness commented that this petitioner had told the witness that he did not wish to take the stand against his union brothers. It can only be speculated as to the design or origin that caused the unresponsive answer. The trial

counsel for this petitioner duly objected and moved for a mistrial which was overruled.

The effect upon a jury of such comment on this petitioner's failure to testify again can only be speculative, but this petitioner now submits that the same denied him a fair trial. *U. S.* v. *Kilpatrick,* 6th Circuit, 477 F. 2d 357 (1973).

The government's position is that this comment constituted harmless error. *U. S.* v. *Earl,* 6th Circuit, 529 F. 2d 1145 (1976), *Meeks, III* v. *Havener,* 545 F. 2d 9 (1976) and *Chapman* v. *California,* 386 U.S. 18 (1967).

In *Chapman,* this Court has formulated the harmless-error rule. Before comments would mandate a mistrial, those comments would have to be found to be harmless beyond a reasonable doubt. In *Earl* and *Meeks,* supra, the Courts found that the overwhelming evidence of the defendant's guilt made any comment harmless. This action is readily distinguishable in that there was blatantly insufficient evidence to indicate this petitioner's guilt, and therefore any comment raising any inference of guilt was an unconstitutional deprivation of this petitioner's right to a fair trial.

After rendering the *Chapman* decision, this Court later ruled:

> "Comment on a defendant's failure to testify cannot be labeled harmless error in a case where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have supported acquittal." *Anderson* v. *Nelson*, 390 U.S. 523, 524 (1967).

Petitioner submits the comment made at trial inferred guilt and had to have been used by the jury as a basis of conviction not only because there was evidence which could have supported the acquittal but it was in fact obviously used itself as a basis for conviction. In the same term, this Court later held that commenting upon a petitioner's failure to take the stand violated his constitutional privilege against self-incrimination. *Fontaine* v. *California*, 390 U.S. 593, 596 (1967). This Court further held:

> "The jury has been asked to convict the petitioner on the basis of circumstantial evidence, in the absence of testimony from the state's agent who allegedly made the purchases from petitioner. In these circumstances, the state has not met its burden of proving beyond a reasonable doubt that the erroneous comment and instruction did not contribute to petitioner's conviction." *Fontaine*, p. 596 and citing *Chapman* v. *California*, supra, p. 25-26.

For these reasons, petitioner submits that the comment on his failure to testify was not harmless

error and the government has not met its burden of proving that such comments did not contribute to this petitioner's conviction.

III. WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN EXCLUDING PRIOR INCONSISTENT STATEMENT OF ADVERSE WITNESS BY REFUSING TO PERMIT THIS PETITIONER'S TRIAL COUNSEL FROM QUESTIONING ANOTHER WITNESS.

One of the victims testified that this petitioner was the person who approached the car in Kentucky and shot the other victim. This witness at trial identified this petitioner, giving a description of physical characteristics. This same witness had previously given a physical description of the alleged assailant to a police officer. Trial counsel for this petitioner did not question the victim concerning his prior inconsistent statement, but did attempt to examine the police officer concerning the statement given. The Court upon objection refused to allow the trial counsel to further examine the witness, citing Rule 613 of the Federal Rules of Evidence.

This Rule provides:

> "(b) Extrinsic evidence of prior inconsistent statement of witness. — extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to inter-

> rogate him thereon, or the interests or justice otherwise require."

Factually, there was no reason for the trial court to exclude the statement of the police officer concerning any prior inconsistent statement given by the victim. The victim was available and subject to recall to explain or deny his statements. This witness was subpoenaed by the Government and the Government had every opportunity to interrogate the witness or recall him to give him the opportunity, if needed, to explain his statement. Obviously, the interest of justice required the admission of this evidence in that the same implicated a co-defendant as the perpetrator of the criminal activity and would have been tangible, believable evidence for the jury to acquit this petitioner.

Federal Rule of Evidence 613(b) has abolished the requirement of asking a witness if he made a prior inconsistent statement. The First Court of Appeals in *U. S.* v. *Barrett*, 539 F. 2d 244, 245 (1976) held:

> "It is clear, however, that Federal Rule of Evidence 613(b) has relaxed any absolute requirement that this practice be observed, only requiring instead that the witness be afforded at sometime an opportunity to explain or deny, and for further interrogation."

This Court has held that a conviction must fall under the Fourteenth Amendment when the prosecu-

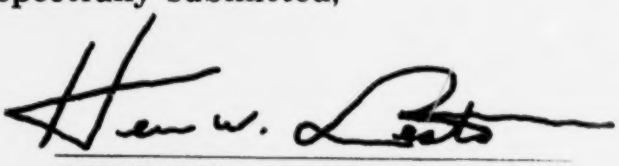
tion allows false evidence to go uncorrected even though the testimony may be relevant only to the credibility of a witness. *Giles* v. *Maryland*, 386 U.S. 66, 74 (1966).

The respondent has every opportunity to make the witness available to testify to explain, admit or deny his prior inconsistent statement be admitted affording the jury the opportunity to evaluate either the credibility of the witness or to consider the prior identification as evidence of guilt of a co-defendant or evidence to be indicating innocence of this petitioner. As a direct result of the denial of the introduction of the prior inconsistent statement, this petitioner was not afforded a fair trial.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,



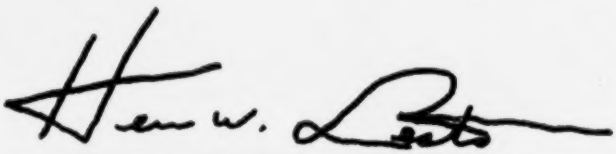
HERMAN W. LESTER
COMBS AND LESTER, P.S.C.
207 Caroline Avenue
P.O. Drawer 551
Pikeville, Kentucky 41501

Telephone (606) 437-6218

Attorney for Petitioner

CERTIFICATE OF SERVICE

Pursuant to U.S. Supreme Court Rule 33, I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were this day mailed to the Solicitor General, Department of Justice, Washington, D. C. 20530, and also to the Honorable Patrick Molloy, United States Attorney for the Eastern District of Kentucky. P. O. Box 1490, Lexington, Kentucky 40507, attorney for respondent, this 23rd day of May, 1980.



Herman W. Lester

APPENDIX

FILED
APR 25 1980
JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

CHARLES WILLIAM HOOD, and WALTER DALE BURGESS, Defendants-Appellants

ORDER

BEFORE: WEICK and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge

Burgess and Hood appeal their convictions of federal kidnapping, 18 U.S.C. §1201. During the summer of 1979, the Oil, Chemical and Atomic Workers Union was on strike against the Semet Solvay Division of Allied Chemical Corporation, located in Ashland, Kentucky. In the early morning hours of July 4, 1979, Burgess and Hood, along with three fellow union members, seized at gunpoint two security guards at the plant. The guards were taken to two boats waiting on the Kentucky shoreline of the Ohio River. Over an hour later, the guards were released either on the Ohio shoreline or into the Ohio River near the Ohio shoreline.

Defendants raise several issues on appeal. First, they argue that the evidence is insufficient to

establish an interstate transportation of the security guards. Though the exact position of the Ohio-Kentucky border at Ashland, Kentucky has not yet been determined, it is indisputable that the two security guards walked on Ohio territory and were released at a location where their only feasible route to safety was the Ohio shoreline. Also, one guard testified that both boats touched the Ohio shore.

Second, defendants contend that the evidence did not justify the district court giving jury instructions on aiding and abetting the interstate kidnapping. A person acts as an aider and abettor if he knowingly associates with a criminal venture with intent to commit a crime, and then participates in the venture as something he wishes to have occur or acts in some way to make the venture succeed. *Mathews* v. *United States,* 449 F.2d 985 (D. C. Cir. 1971). A person is liable for any criminal act which, in the ordinary course of events, was a natural or foreseeable consequence of a crime that he advised or commanded. *United States* v. *DeLa Motte,* 434 F.2d 289 (2d Cir. 1970), *cert. denied,* 401 U.S. 921 (1971). We hold that the evidence justifies the instruction either on the theory that the defendants helped to cause the others to take the guards to Ohio or on the theory that the interstate transportation was a reasonably foreseeable consequence of taking the guards onto the river.

Third, Hood contends that the comment of a witness for a codefendant upon Hood's failure to

testify is prejudicial error. Hood's argument lacks merit, because the witness in fact did not comment on Hood's right against self-incrimination, but simply remarked that Hood did not want to hurt his union brothers by testifying. App. 228-29. Also, the comment was inadvertent and not intentionally elicited.

Finally, defendants argue that the district court erred in refusing to permit a police officer to testify about a prior inconsistent statement made by one of the guards about the description of the person who shot the other guard. The district court sustained the Government's objection on the basis of Rule 613(b), Fed. R. Evid., because defense counsel had not asked the guard about his statement to the police officer. Because defendants did not lay the proper foundation required by Rule 613, we hold that the district court did not err in its ruling.

Accordingly, the judgment of the district court is affirmed.

ENTERED BY ORDER
OF THE COURT
John P. Hehman, Clerk
By /s/ Grace Keller
Deputy Clerk

* * * * * * *